

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.11.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

CMSA No.11 of 2013 and M.P.No.1 of 2013

Vani

... Appellant

-vs-

1. R.Manoharan

2. P.V.Jayaraman

... Respondents

Civil Miscellaneous Second Appeal filed under order 21 Rule 58 of CPC against the judgment and decree of the Principal Subordinate Judge, Gobichettipalayam in CMA.No.4 of 2006 dated 9.10.2007 confirming the fair and final order of the District Munsif, Sathyamangalam, in E.A.No.22 of 2003 in E.P.No.19/2002 in O.S.No.207/2001 dated 29.6.2005.

For Appellant : Mr.R.Doraisamy

For 1st Respondent : Mr.M.Roshan Atiq for R1

R2 : No appearance

J U D G M E N T

The present Civil Miscellaneous Second Appeal has been filed against the judgment and decree of the learned Principal Subordinate Judge, Gobichettipalayam, in CMA.No.4 of 2006 dated 9.10.2007, confirming the fair and final order of the District Munsif, Sathyamangalam, in E.A.No.22 of 2003 in E.P.No.19/2002 in O.S.No.207/2001 dated 29.6.2005.

2. This Court has framed the following substantial questions of law:

1. Whether the courts below are right in allowing the Claim Petition without considering Section 28 of the Hindu Succession Act which clearly states that the appellant's right is pre-existing right in property, if any person succeeding to the property carries with it the legal obligation to maintain the appellant-wife? ; and

2. Whether the appellant is entitled to have the property belonging to her husband by way of attachment for maintenance?

3. Learned Counsel appearing for the appellant submitted that after the marriage of the appellant with the 2nd respondent husband on 22.08.1979 as per Hindu rites and customs at Thiru Neelakandar Thirumana Mandapam, Vadakkupettai, Sathyamangalam Circle, they were blessed with two female children, by name Devi on 8.4.1987 and Kalpana on 5.6.2000. Thereafter, the appellant was deserted. Therefore, she filed a civil suit in O.S.No.207/2001 seeking maintenance and in the said suit filed against her husband, the 2nd respondent herein, remained ex-parte. Hence, the suit was decreed on 27.11.2001 holding that the appellant-wife is entitled to get Rs.1,000/- p.m. towards maintenance from 25.09.2000 for a period of one year from her husband. In the said decree, it was also specifically mentioned that the 2nd respondent husband shall be liable to pay a sum of Rs.500/- p.m. to the minor daughter Devi/2nd plaintiff therein. However, when E.P.No.19/2002 was filed for execution of the decree, the 1st respondent herein filed E.A.No.22/2003 on 20.01.2003 raising various objections that the Execution Application was not maintainable against the petition mentioned property for the simple reason that the said property was already sold away even before filing of the said suit. It was also mentioned that the petition mentioned property was sold on 13.11.2000 whereas the suit was filed only on 19.09.2001 and the ex-parte decree for maintenance was passed on 27.11.2001. The learned Execution Court accepting the contentions and the reasons mentioned in E.A.No.22/2003 filed by the 1st respondent while allowing the said E.A.22/2003 made it clear that the sale of the property on 13.11.2000 cannot be interfered with. Aggrieved thereby, the plaintiff/appellant herein has filed the present Civil Miscellaneous Second Appeal.

4. Learned Counsel appearing for the appellant-wife further raised a specific question of law that when the wife is having all pre-existing right to claim maintenance, the First appellate Court without considering Section 28 of the Hindu Succession Act, allowed the claim petition and therefore, the decree dated 27.11.2001 passed in O.S.No.207/2001 on the file of the learned District Munsif, Sathyamangalam, cannot be set aside at the instance of the purchaser of the property from her husband. On this score, the learned Counsel for the appellant sought for allowing the present Civil Miscellaneous Second Appeal by setting aside the impugned judgment and decree passed in CMA.No.4 of 2006 dated 9.10.2007.

5. Learned Counsel appearing for the 1st respondent opposing the above argument replying to the same pleaded that this appeal cannot stand for legal scrutiny for the reason that when the plaintiff/appellant filed the suit on 19.09.2001 in O.S.No.207/2001 claiming only maintenance from her husband, till date, she did not even file a suit for divorce. Secondly, on the date of filing of the suit seeking maintenance i.e. on 19.09.2001, the petition mentioned property was not owned by her

husband/2nd respondent herein for the simple reason that it was sold on 13.11.2000 itself to the 1st respondent. Therefore, when the petition mentioned property was owned by the appellant's husband, neither on the date of filing of the suit nor on the date of passing of the decree, the sale that took place on 13.11.2000 in favour of the 1st respondent cannot be interfered with and the ex-parte decree dated 27.11.2001 passed in favour of the appellant wife cannot bind the sale deed dated 13.11.2000 executed between the respondents 1 and 2.

6. Arguing further, the learned Counsel for the 1st respondent submitted that when the plaintiff/appellant herein has filed the suit for maintenance in the year 2001 in O.S.No.207/2001, it was not even established by the plaintiff/appellant before any one of the courts below whether the appellant and her husband were living separately. Therefore, it was the claim made by the 1st respondent before the Execution Court that the suit was filed by the appellant wife inconnivance with his husband/2nd respondent that the sale of the property that took place on 13.11.2000 was sought to be attached. Accepting the said argument, the learned Execution Court and also the First Appellate Court rightly came to the conclusion that when there was no iota of evidence adduced by the appellant wife who was living away from her husband, the E.A.No.22/2003 filed for setting aside a part of the decree only in respect of the property that was sold on 13.11.2000 (Attached upon the decree for maintenance), allowed the same. Therefore, even now, the maintenance decree has not been interfered with by the courts below. Hence, the learned Counsel for the appellant argued that the appellant wife has got a pre-existing right in property for seeking maintenance, hence, the appeal has to be dismissed.

7. In reply, the learned Counsel for the appellant submitted that all along, since the 2nd respondent-husband deserted the appellant wife, the appellant-wife has left the matrimonial house. Therefore, there is no need for moving any application for obtaining a decree for divorce and further, as a dutiful wife, she can also raise a claim for maintenance without even resorting for divorce.

8. Be that as it may, as rightly contended by the learned Counsel for the appellant that the appellant wife is having pre-existing right to claim maintenance so far as the ex-parte decree dated 27.11.2001 is concerned, the decree in respect of granting maintenance has not been set aside by any of the courts below and what has been set aside is only with regard to the portion of the decree in respect of the attachment of the property in favour of the appellant herein by taking into account the sale deed dated 13.11.2000 executed between the respondents 1 and 2 thereby raising the attachment. As a matter of fact, Section 64 of the CPC clearly says that if an

attachment is made by private transfer and after such attachment any transfer has taken place, such transfer is void as against all claims enforceable under the attachment. But, in the present case, when the sale of the suit property has taken place on 13.11.2000 whereas the suit was filed only on 19.09.2001, the E.A.No.22/2003 filed by the 1st respondent has been rightly allowed as per Section 64 of the C.P.C., hence the same cannot be found fault with. Equally Sections 52 and 53 of the Transfer of Property Act cannot be also invoked by the plaintiff/appellant, because pendency of a suit or proceedings must exist that does not exist here. Therefore, both the substantial questions of law are answered against the appellant-wife.

9 . In the result, the Civil Miscellaneous Second Appeal fails and the same is accordingly dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. Principal Subordinate Judge,
Gobichettipalayam.

2. District Munsif Court,
Sathyamangalam.

सत्यमेव जयते

CMSA.No.11/2013

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